

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; GINA
McCARTHY, Administrator; DENNIS
McLERRAN, Region 10 Administrator,
United States Environmental Protection
Agency,

Defendants.

No. 2:13-cv-01866-JLR

***AMICI CURIAE BRIEF OF THE
WESTERN STATES PETROLEUM
ASSOCIATION AND THE AMERICAN
PETROLEUM INSTITUTE***

NOTE ON MOTION CALENDAR:
November 7, 2014

AMICI CURIAE BRIEF OF WSPA AND API (2:13-cv-01866-JLR)

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I. INTRODUCTION

This litigation arises in the context of the ongoing national and international policy debate over the effects of global climate change attributed to anthropogenic emissions of greenhouse gases (“GHGs”), particularly carbon dioxide (CO₂). In this instance, the national advocacy group Center for Biological Diversity (“CBD”) seeks to shape federal policy regarding a purported secondary effect of global CO₂ emissions – ocean acidification – through the novel use of Section 303(d) of the Clean Water Act (“CWA”). However, CBD’s efforts to compel climate change policy changes through this CWA litigation fail in the first instance because CBD lacks standing. CBD has not met and cannot meet the causation and redressability requirements to establish Article III standing because the alleged injuries of its members are not traceable to the actions of the U.S. Environmental Protection Agency (“EPA”) at issue in this litigation and would not be remedied by a favorable decision.¹

II. SUMMARY OF ADMINISTRATIVE RECORD

The administrative record produced by EPA states that “the term *ocean acidification* refers to reductions in the pH of seawater caused by oceanic uptake of CO₂ from the atmosphere and by other chemical additions to or subtractions from the ocean.” WA-000712 (Feely et al. 2012 at 59).² It is estimated that, over the past two-and-a-half centuries, the surface oceans

¹ Western States Petroleum Association (“WSPA”) and American Petroleum Institute (“API”) sought but were denied leave to intervene in this litigation; however, the Court granted WSPA and API leave to submit a brief as *amici curiae*. Dkt. 22 at 20-21. The interests of WSPA and API in this matter are addressed in detail in their submissions for intervention and in the Court’s related order, and are not restated here. *See id.*; Dkts. 14, 15, 17. This *amici curiae* brief has not been authored or edited by counsel for a party; nor has a party or a party’s counsel, or a person other than *amici*, contributed money to fund preparation and submittal of this brief. *Amici* also join in the arguments of EPA addressed to the merits of CBD’s claims.

² This section briefly summarizes portions of the administrative record produced by EPA, as relevant to the issues addressed in this brief. *See Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985) (in an Administrative Procedure Act case, the facts are established by the agency’s administrative record). Feely et al. 2012 refers to the final report of the National Oceanic and Atmospheric Administration’s Scientific Summary of Ocean Acidification for the Washington Shellfish Initiative Blue Ribbon Panel. *See* WA-000712.

1 “have absorbed more than 550 billion tons of carbon dioxide from the atmosphere, or
 2 approximately 30% of the total anthropogenic carbon dioxide emissions” worldwide. OR2-
 3 002161 (Feely et al. 2010). The oceanic uptake of atmospheric CO₂ produced by global
 4 emissions is asserted to be “indisputably the most important driver of ocean acidification in the
 5 open-ocean waters of the North Pacific.” WA-000712 (Feely et al. 2012 at 15).³

6 Both natural (*e.g.*, upwelling of deep ocean water, freshwater (river) inputs) and
 7 anthropogenic (*e.g.*, local emissions and wastewater discharges) local factors are also recognized
 8 as potential contributors to regional acidification.⁴ However, it is unknown and, currently
 9 unknowable, how, where, whether, when, and to what extent these factors contribute to ocean
 10 acidification. *See, e.g.*, WA-000712 (Feely et al. 2012 at 36) (“Whether [local CO₂ emissions
 11 from the Puget Sound region] has resulted in a measurable decrease in the pH of local surface
 12 waters is not known.”); *id.* at 33 (“[I]t is not possible to *directly* determine the level to which
 13 human activity in this [Puget Sound] region is contributing to acidification.” (emphasis in
 14 original)); *id.* at 37 (“The significance of [emissions of nitrogen oxides and sulfur oxides in the
 15 Puget Sound region] for ocean acidification in the Puget Sound region is . . . not known.”); *id.*
 16 (“The contribution of wastewater discharges to ocean acidification conditions is not known[.]”);
 17 *id.* at 35 (“What is *not* known is the magnitude of the effect that the anthropogenic nitrogen
 18 inputs have on pH or aragonite saturation levels.” (emphasis in original)).

19 ³ Although global CO₂ emissions are identified in the administrative record as the
 20 primary driver of ocean acidification, whether, how, and when any such acidification can be
 21 reliably associated with identifiable impacts, such as the alleged injuries of CBD’s members,
 remains unknown and uncertain.

22 ⁴ Upwelling has been identified as the primary local factor influencing ocean acidification
 23 in western North America. OR2-002162 (Feely et al. 2010) (“The coastal region off western
 24 North America is strongly influenced by seasonal upwelling . . . [the] acidified, oxygen-depleted
 25 waters have the potential for entering Puget Sound via the Juan de Fuca submarine canyon in the
 26 summer and fall months.”). According to the record, the source water for upwelling on the
 North American Pacific coast carries anthropogenic CO₂ deposited from global emissions and
 “takes on the order of decades to transit from the point of subduction to the upwelling locales
 (Feely et al. 2008).”

III. ARGUMENT

At issue is EPA's approval of the CWA § 303(d) "impaired waters" lists proposed by the states of Washington and Oregon ("EPA's Approval"). As demonstrated below, CBD has not established that any of its individual members have standing to bring the claims CBD has asserted in this litigation. Although CBD's members state generalized concerns about what they believe to be the possible effects of ocean acidification, they do not assert the "specific facts" required to establish the core elements of Article III standing. Nowhere in the declarations submitted by CBD are specific facts demonstrating that any member has experienced an injury that is caused by EPA's Approval and would be redressed by the relief CBD seeks.

A. Article III Standing Requirements

Every plaintiff must establish Article III standing before proceeding to the merits of its case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Maricopa-Stanfield Irr. & Drainage Dist. v. United States*, 158 F.3d 428, 433 (9th Cir. 1998) (addressing threshold standing issue raised by *amici*). To demonstrate standing, an organizational plaintiff has the burden to prove that at least one of its members (i) has suffered a concrete, particularized, and imminent injury; (ii) that is fairly traceable to the actions of the defendant; and (iii) likely to be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Steel Co.*, 523 U.S. at 103-04 ("This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." (footnote omitted)).⁵ These elements must be met "for each claim . . . and for each form of relief sought." *Wash. Envtl.*

⁵ Organizations have standing if their "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Assuming that the environmental interests at stake in this case are germane to CBD's purpose, the issue presented is whether CBD's members would have standing to sue individually.

1 *Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013). At the summary judgment stage, a party
 2 must “‘set forth’ by affidavit or other evidence ‘specific facts’” to establish these elements.
 3 *Lujan*, 504 U.S. at 561 (citation omitted).

4 **B. CBD’s Alleged Injuries Are Not Causally Connected To EPA’s Approval**

5 A plaintiff must demonstrate that it has experienced an injury that is fairly traceable to
 6 the defendant’s conduct and not the result of independent causes. *Id.* at 562; *Bellon*, 732 F.3d at
 7 1146 (“[C]ausality examines the connection between the alleged misconduct and injury”);
 8 *Dellums v. U.S. Nuclear Regulatory Comm’n*, 863 F.2d 968, 980 (D.C. Cir. 1988) (“[T]he
 9 complainant has the burden of showing that but for the particular governmental action that he is
 10 challenging, the injury would abate.”). For a plaintiff to have standing, “[t]he line of causation
 11 between the defendant’s action and the plaintiff’s harm must be more than attenuated” and the
 12 links in the line of causation cannot be “hypothetical or tenuous.” *Bellon*, 732 F.3d at 1141-42
 13 (quoting *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (Pro, J.,
 14 concurring) (internal quotation marks and citations omitted), *cert. denied*, 133 S. Ct. 2390
 15 (2013)); *see also id.* at 1142 (“Under *Lujan*’s causality prong, Plaintiffs must show that a causal
 16 connection exists between their asserted injuries and the conduct complained of – *i.e.*, the
 17 Agencies’ failure to set and apply RACT standards.”); *Zivkovich v. Vatican Bank*, 242 F. Supp.
 18 2d 659, 670 (N.D. Cal. 2002) (causation requirement “demands Plaintiff show each link in the
 19 causal chain between the defendant and the asserted injury” (citing *Allen v. Wright*, 468 U.S.
 20 737, 759 (1984))).

21 CBD has not demonstrated that its members’ alleged injuries are caused by EPA’s
 22 Approval. First, the administrative record associates ocean acidification with global CO₂
 23 emissions by countless third parties across the globe over the past several decades that have
 24 occurred, and will occur, regardless of EPA’s Approval. Second, the record also establishes that
 25 whether, where, when, how, and to what extent other factors may contribute to ocean
 26 acidification are uncertain and unknown. The declarations submitted by CBD’s members make

no showing, nor can they, that their alleged injuries are caused by the contributions of other factors to ocean acidification.

1. CBD's alleged injuries are attributable to the uptake of worldwide CO₂ emissions by the Pacific Ocean over many decades

According to the administrative record, the oceanic uptake of atmospheric CO₂ from global sources is “the most important driver of ocean acidification in the open-ocean waters of the North Pacific.” WA-000712 (Feely et al. 2012 at 15); *see id.* at 21 (“The human contribution to acidification on Washington’s outer coast is almost entirely due to atmospheric CO₂ from global sources.”). Moreover, as explained in the Blue Ribbon Panel’s Scientific Summary, acidification that is observed in the oceans today, and that may be observed in the foreseeable future, is the result of uptake of CO₂ that was emitted decades, if not centuries, ago. *See id.* at 4-6.⁶ EPA’s Approval has no bearing on how the processes of oceanic CO₂ uptake and acidification will or will not affect CBD’s members presently or in the foreseeable future. In this respect, the Ninth Circuit’s recent decision in *Bellon* is instructive.

In *Bellon*, the plaintiffs filed a lawsuit to compel state agencies to regulate the CO₂ emissions of five refineries in Washington State. The plaintiffs maintained that they had suffered injuries resulting from the local effects of climate change (such as reduced recreational opportunities due to decreased snow cover) and that the state agencies caused these injuries by failing to regulate the CO₂ emissions of the five refineries. *Bellon*, 732 F.3d 1131. A unanimous Ninth Circuit panel held that the plaintiffs lacked standing to bring their claims.⁷ The court

⁶ Feely et al. 2012 found that ocean acidification in Washington State depends in part on unpredictable wind patterns that result in upwelling of global atmospheric CO₂ deposited between 30 and 50 years ago. WA-000712 (Feely et al. 2012 at 11) (“Water that is upwelling onto the coast of Washington and Oregon now contains approximately ~31 μmol kg⁻¹ anthropogenic CO₂ and has been out of contact with the atmosphere for approximately 30–50 years.”).

⁷ In *Bellon*, as here, the defendant regulatory agencies declined to pursue standing, leaving the issue to be raised by the regulated community and decided by the court.

determined that the chain of causation was too attenuated because of the “natural disjunction between Plaintiffs’ localized injuries and the greenhouse effect” as local emissions “quickly mix and disperse in the global atmosphere” with global emissions before causing the alleged climate change effects. *Id.* at 1143. In addition, the court found that the plaintiffs had failed to establish causation due to the “multitude of independent third parties,” both in and outside the United States, emitting CO₂ that caused the alleged injuries. *Id.* at 1144. In short, the plaintiffs could not demonstrate that their claimed injuries were fairly traceable to the failure to regulate CO₂ emissions from the five refineries “because the record show[ed] no evidentiary support establishing this causal nexus.” *Id.*

Similar to the *Bellon* plaintiffs, CBD’s members here assert that they have suffered recreational injuries that they attribute to ocean acidification. *See* Dkt. 33 (CBD Br.) at 10-11; *see generally* Dkts. 33-2 (Antoine Decl.), 33-3 (Weitzer Decl.), 33-4 (Moritz Decl.), 33-5 (Easton Decl). Also like the *Bellon* plaintiffs, CBD’s members have failed to provide evidentiary support showing that EPA’s Approval – not worldwide CO₂ emissions – is the cause of their alleged injuries. Nor has CBD provided any explanation or basis for how EPA can regulate global sources of CO₂ emissions through CWA § 303(d) (because it cannot). Because CBD’s claimed injuries “involve[] numerous third parties whose independent decisions collectively have a significant effect on plaintiffs’ injuries, ... the causal chain [is] too weak to support standing.” *Bellon*, 732 F.3d at 1142 (quoting *Native Vill. of Kivalina*, 696 F.3d at 867).⁸

⁸ *See also Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009) (“[T]here is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group at any particular point in time.”); *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011) (a project accounting for 0.03% of U.S. GHG emissions does not result in discernible local impacts because such emissions do “not translate into locally-quantifiable environmental impacts given the global nature of climate change”); *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. 01:11-cv-41, 2011 WL 3321296, at *4 (E.D. Va. July 29, 2011) (plaintiffs could not establish causation because a “reduction of greenhouse gas emissions in one area or from one source has no effect on greenhouse gas levels that are specific to that area”); 73 Fed. Reg. 44,354, 44,367 (July 30, 2008) (Advance Notice of Proposed Rulemaking regarding interpretation of *Massachusetts v.*

1 **2. The alleged injuries are not and cannot be traced to local sources that could**
 2 **be regulated by EPA**

3 CBD contends in its summary judgment brief that “[l]ocal sources of pollution have a
 4 large impact on pH in many of the coastal areas in Oregon and Washington, and implementing
 5 local pollution control would reduce acidification, ameliorating the harm Center members are
 6 suffering.” CBD Br. at 10. As set forth below, CBD’s generic assertions of standing based on
 7 purported local sources of pollution are not supported by the record and, in any event, are
 8 insufficient to establish causation.

9 Although various anthropogenic and natural sources have been identified as factors that
 10 may contribute to ocean acidification, the record demonstrates that how, whether, when, where,
 11 and to what extent local factors in Washington and Oregon influence ocean acidification are
 12 unknown and uncertain. *See* § II *supra*. Indeed, none of the declarations submitted by CBD’s
 13 members present “specific facts” demonstrating that they have been injured as a result of local
 14 sources of pollution. For example, although CBD argues that local pollution impacts “many of
 15 the coastal areas in Oregon and Washington,” it fails to identify any of the specific areas
 16 allegedly impacted. CBD Br. at 10. CBD also argues that stormwater and erosion “directly
 17 exacerbate coastal ocean acidification in the Pacific Northwest,” but does not identify which
 18 coastal waters are exacerbated by such runoff or whether such waters are used by its members.
 19 *Id.*⁹ These vague and conclusory allegations are not sufficient to establish the “specific facts”

20
 21 EPA) (there is “little or nothing that a single state or region can do that will appreciably alter the
 22 atmospheric GHG concentration level in that particular State or region”; “local and regional
 public health and welfare” cannot “be improved by reducing local and regional emissions”).

23 ⁹ The Moritz Declaration states that “*Feely et al.*, found that about 50 percent of
 24 acidification in the Puget Sound’s Hood Canal is the result of anthropogenic runoff.” Dkt. 33-4
 25 ¶ 14. However, Ms. Moritz’s incorrect statement appears to result from a misinterpretation of
 26 Feely et al. 2010, which simply cites to a study (Doney et al. 2007) that did not involve Puget
 Sound for the proposition that local sources in general “can further reduce the pH by as much as
 an additional 50%.” OR2-002165 (Feely et al. 2010 at 446) (emphases added) (citing OR2-
 001982 (Doney et al. 2007)). Feely et al. 2010 points out that the data concerning local

1 necessary to support causation. *See Bellon*, 732 F.3d at 1142; *see also, e.g., Tex. Indep.*
 2 *Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 972 (7th Cir. 2005) (citizens failed to
 3 establish causation and thus lacked standing to challenge EPA stormwater general permit
 4 because affidavit’s “conclusory statement does not identify any specific construction sites
 5 authorized under the General Permit and fails to present evidence of any discharges into the
 6 water bodies at issue”); *Conservation Law Found., Inc. v. EPA*, 964 F. Supp. 2d 175, 191 (D.
 7 Mass. 2013) (plaintiffs lacked standing to challenge EPA’s approval of TMDLs in part because
 8 supporting affidavits’ conclusions on effects of discharges were “speculative and
 9 inadmissible”).¹⁰

10 CBD’s other allegations concerning local pollution establish only that acidification may
 11 be caused by local sources, but identify no causal connection between any local sources and the
 12 alleged injuries of CBD’s members. Specifically, CBD argues that “human activities can
 13 significantly lower the pH of nearby waters, creating acidification hot spots” and that “[i]n some

14
 15 acidification are not from the Pacific Northwest but from “regions with more significant
 16 anthropogenic nutrient loading, such as Chesapeake Bay and the Belgian coastal zone.” OR2-
 17 002166; *accord* OR2-002892 (Kelly et al. 2011 at 1036). In fact, Feely et al. do not assign any
 18 percentage of acidity to local anthropogenic sources and, instead, calculate that between 24%
 19 and 49% of the dissolved inorganic carbon in Hood Canal is from “oceanic contribution”
 20 (*i.e.*, an influx of coastal waters bearing dissolved inorganic carbon). OR2-002166 (Feely et al.
 21 2010 at 442, 447-48); WA-000712 (Feely et al. 2012 at 32). The other 51% to 76% of
 22 acidification in Feely et al.’s calculation is attributed to natural respiration processes (*i.e.*, when
 23 plankton die and microbial degradation of the plankton releases carbon dioxide into the
 24 water). OR2-002166 (Feely et al. 2010 at 443, 447-48). Finally, even if the pH of Hood Canal
 25 was significantly affected by local anthropogenic sources, CBD has not established standing
 26 because none of its declarants (including Ms. Moritz) assert that they visit and use Hood Canal.

¹⁰ The vagueness with which CBD alleges injury further indicates that its harm amounts
 to a generalized grievance that will not support standing. *See Pollack v. U.S. Dep’t of Justice*,
 577 F.3d 736, 743 (7th Cir. 2009) (determining that plaintiffs’ “generalized statements . . . do not
 give rise to standing”); *see also* Dkt. 22 at 12 (Order on Motion to Intervene) (“[A]n
 undifferentiated, generalized interest in the outcome of an ongoing action is too porous a
 foundation on which to premise intervention as of right.” (internal quotation marks and citation
 omitted)); *State of Cal. Dep’t of Soc. Servs. v. Thompson*, 321 F.3d 835, 846 n.9 (9th Cir. 2003)
 (standard for Article III standing is more stringent than standard for intervention).

1 coastal areas, local sources of air pollution can contribute as much as ten to fifty percent of the
 2 CO₂-derived acidification.” CBD Br. at 11 (emphases added) (citing Kelly et al. 2010; Feely et
 3 al. 2012). However, the fact that local sources theoretically can cause local acidification does
 4 not establish that local sources have caused or are likely to cause injuries to CBD’s members in
 5 the waters they use. Moreover, contrary to CBD’s argument, researchers have yet “to determine
 6 if there is a causal relationship between local air emissions and local marine water acidity.”
 7 WA-000712 (Ruckelshaus et al. 2012 at 28, 51).

8 Nor does the record support CBD’s conclusory allegations that its injuries result from
 9 local acidification. Neither of the studies relied upon by CBD (*i.e.*, Feely et al. 2012 and Kelly et
 10 al. 2011) concludes that in-state air emissions or runoff has meaningfully contributed to
 11 acidification in any water body in Washington or Oregon. Kelly et al. 2011 addresses local
 12 acidification hot spots in the Gulf of Maine, Chesapeake Bay, and the Manning River estuary in
 13 Australia, and does not discuss Washington or Oregon coastal waters at all. OR2-002892. Feely
 14 et al. 2012 simply acknowledges the possibility that local sources may contribute to ocean
 15 acidification based on a study that does not discuss Pacific Northwest waters. *See* WA-000712
 16 (Feely et al. 2012) (citing OR2-001982 (Doney et al. 2007)). With regard to the Pacific
 17 Northwest coast and Puget Sound, however, Feely et al. consistently and repeatedly conclude
 18 that the existence and degree of local acidification is unknown:

- 19 • “What is *not* known is the magnitude of the effect that the anthropogenic nitrogen inputs
 20 have on pH or aragonite saturation levels.” *Id.* at 35 (emphasis in original).
- 21 • “The significance of these acid gases [NO_x and SO_x] for ocean acidification in the Puget
 22 Sound region ... is not known.” *Id.* at 37.
- 23 • “Whether this local enhancement [of CO₂ in areas near Puget Sound] has resulted in a
 24 measurable decrease in the pH of local surface waters is not known.” *Id.* at 36.
- 25 • “The contribution of wastewater discharges to ocean acidification conditions [in Puget
 26 Sound] is not known[.]” *Id.* at 37.

- “The effect from existing pulp mills on water quality in Puget Sound is not known[.]” *Id.* at 36.

For other Washington and Oregon coastal waters beyond Puget Sound, Feely et al. reach similar conclusions that the existence and degree of local acidification are unknown. *See, e.g., id.* at 49-50 (in contrast to European estimates of high local acidification, “[s]imilar measurements of carbon dioxide concentrations in Washington’s estuaries [such as Willapa Bay] are not available”).

Not only do the declarations of CBD’s members fail to show that their alleged injuries are caused by local sources of pollution, they also altogether fail to identify any specific local sources of acidity in the waters they use. *See Pollack v. U.S. Dep’t of Justice*, 577 F.3d 736, 742 (7th Cir. 2009) (“*Lujan* makes clear that when a vast environmental area is involved and the pollution affects one discrete area while a plaintiff intends to visit a different discrete area, that plaintiff does not have standing.”); *see also Wilderness Soc’y, Inc. v. Rey*, 622 F.3d 1251, 1257 (9th Cir. 2010) (no standing because “no indication that the Ash Creek Project would affect the particular area of the Umpqua Forest that Anderson plans to use in the future”). Although CBD asserts that after a § 303(d) listing, “programs under the Clean Water Act will reduce these local pollution inputs,” such as runoff and stormwater surges, it does not identify any actual stormwater or runoff inputs causing acidity in the waters used by its members. CBD Br. at 11. In addition, the Moritz Declaration expresses generalized concern about pollution from concentrated animal feeding operations (“CAFOs”), but it, too, fails to identify any specific CAFOs or other local sources in the areas used by Ms. Moritz. *See* Dkt. 33-4 ¶¶ 14, 19, 20.¹¹

¹¹ Ms. Moritz also asserts that if EPA had disapproved Washington and Oregon’s impaired waters lists, “EPA and the states would have established and implemented pollution limits, reducing acidifying contributions to the marine waters I enjoy and redressing the ongoing harm to my interests.” *Id.* at ¶ 19. However, this conclusory statement lacks any “specific facts” demonstrating “the connection between the alleged misconduct and injury.” *Bellon*, 732 F.3d at 1146. Moreover, Ms. Moritz does not identify any waters that she uses that have been acidified by local sources that could be regulated by EPA or the states. *See also infra* § III.C.

1 Finally, another CBD member asserts that “[o]cean acidification affects [his] enjoyment
 2 of shellfish harvesting because there are now fewer oysters and clams available to harvest” and
 3 that “the food web may suffer as a result of ocean acidification.” Dkt. 33-3 ¶¶ 9, 14 (Weitzer
 4 Decl.). However, again, these alleged injuries are not connected to any causal element, nor can
 5 they be so connected:

- 6 • “At this time, we have insufficient information to determine the response of marine food
 7 webs in Washington State to acidification.” WA-000712 (Feely et al. 2012 at 89).
- 8 • “Little is known about the response of individual marine microbial taxa to increasing
 9 pCO₂.” *Id.* at 63.
- 10 • The potential impacts of ocean acidification on other zooplankton species “are virtually
 11 unknown.” *Id.* at 69.
- 12 • Research is needed to “[e]lucidate *direct effects* of ocean acidification on species of
 13 concern, including shellfish” as well as the indirect effects. *Id.* at 80 (emphasis in
 14 original).
- 15 • “The direct impacts of acidification on salmon species remain uncertain, especially
 16 because these species spend their early life stages in fresh waters of relatively low pH.”
 17 *Id.* at 79.
- 18 • “The underlying causes of low levels of Pacific oyster recruitment in Willapa Bay have
 19 not been determined.” *Id.* at 70.¹²

18 ¹² With respect to shellfish, “[o]bservations of high mortality among larval stages of
 19 oysters in the Pacific Northwest have raised concern that changing water chemistry due to ocean
 20 acidification could be causing the negative effects observed in shellfish populations.” WA-
 21 000712 (Feely et al. 2012 at 42). To investigate this concern, studies have been carried out in
 22 Totten Inlet in South Puget Sound, in Dabob Bay near the north end of Hood Canal, and in
 23 Netarts Bay, Oregon. None of these studies yielded conclusive results, but they did demonstrate
 24 some associations with two factors – upwelling and biological respiration. In the Puget Sound
 25 studies, it was found that “[t]he major factor influencing water chemistry in Dabob Bay is wind-
 26 driven localized upwelling, whereas in Totten Inlet, nearshore carbonate chemistry appears to be
 dominated by biological respiration [a natural process].” *Id.* at 42. Similarly, in the Netarts Bay
 study, it was found that carbonate chemistry in the bay is influenced by “the upwelling state of
 the adjacent coastal ocean.” OR2-001526 (Barton et al. 2012); OR2-007615 (Barton et al. 2008)
 (“upwelling of nutrient rich deep ocean water onto the continental shelf results in sharp decline
 in the performance of bivalve larvae”). The study also found that “the bay itself experiences
 large fluctuations in carbonate chemistry driven by primarily natural mechanisms.” OR2-001530
 (Barton et al. 2012); *see also* OR2-002237 (Feely et al. 2008) (“much of the corrosive character

1 In sum, the declarations submitted by CBD's members fail to establish that their alleged injuries
2 are traceable to any sources that could be regulated under CWA § 303(d).¹³

3 **C. CBD Does Not Show That A Favorable Decision Will Redress Its Alleged Injuries**

4 CBD must demonstrate that it is "likely," not "speculative," that a favorable decision will
5 redress its members' alleged injuries. *Lujan*, 504 U.S. at 561 (internal quotation marks and
6 citation omitted). The redressability element is not satisfied where, as here, the plaintiffs'
7 injuries are "likely to continue unabated" despite a favorable court decision. *Bellon*, 732 F.3d at
8 1147; *see Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir.
9 2008) (plaintiffs lacked standing because "if we rule in their favor, they will still suffer injury").

10 CBD cannot establish that a court order vacating EPA's Approval would redress its
11 alleged harm because its members assert injuries attributable to a global process that occurs due
12 to worldwide CO₂ emissions beyond the reach of state and federal regulation. *See* WA-000712
13 (Ruckelshaus et al. 2012 at 35, 36) ("to counter . . . ocean acidification, global emissions of
14 carbon dioxide must be . . . reduced" and "Washington cannot accomplish global emission
15 reductions alone"); *accord* WA-000712 (Feely et al. 2012 at 4); *see also* § III.B.1 *supra*.¹⁴ In
16 addition, for the reasons stated in § III.B.2 *supra*, CBD's generalized allegations of local sources

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19 of these waters is the natural result of respiration processes" (emphasis added)); *see also* Dkt. 34
20 at 17-18, 20-22 (EPA Br.). None of these findings identify even a potential cause of
acidification that can be regulated under CWA § 303(d).

21 ¹³ The causal connection between CBD's alleged harm and EPA's Approval is thus more
22 speculative than in *Bellon* where plaintiffs could at least identify the alleged source of their
23 asserted injuries, namely, five refineries in Washington State. 732 F.3d at 1135; *see also Natural*
Res. Def. Council v. EPA, 542 F.3d 1235, 1245 (9th Cir. 2008) (determining standing was
24 present when "declarations describe . . . observed storm water discharge flowing directly from
construction sites into the waterways the members use" (emphasis added)).

25 ¹⁴ CBD admits that ocean pH will continue to increase so long as global CO₂ emissions
26 continue to increase. *See* WA-000926 (CBD Letter to State of Oregon) ("Ocean pH has
decreased by 0.11 units since the industrial age and will continue to decrease at an accelerated
rate if carbon dioxide emissions continue to increase as predicted[.]").

1 of acidification fail to establish redressability because CBD does not show that the waters its
 2 members claim to use are subject to anthropogenic sources of acidification that could be
 3 addressed through the CWA § 303(d) process. Moreover, CBD has presented no evidence
 4 demonstrating that regulation of theoretical local anthropogenic sources of acidification would
 5 redress its members' alleged injuries in light of overriding global and natural sources of
 6 acidification.¹⁵ In sum, whether a court order vacating EPA's Approval will redress the alleged
 7 injuries of CBD's members is, at best, speculative. CBD has not established the redressability
 8 element.

9 **D. CBD's Alleged Informational Injuries Do Not Establish Standing**

10 CBD's members assert that they are injured because they allegedly will not receive
 11 certain information about ocean acidification as a result of EPA's Approval and will not be able
 12 to participate in future notice and comment processes. In support of these alleged informational
 13 injuries, CBD cites *Federal Election Comm'n v. Akins*, in which the U.S. Supreme Court
 14 determined that the plaintiffs had standing based on a right to disclosure of information about
 15 campaign activities under the Federal Election Campaign Act. 524 U.S. 11, 23-25 (1998).
 16 However, as the Ninth Circuit has made clear, *Akins* applies only in the narrow circumstance in
 17 which the purpose of the statute at issue is to disclose information and, particularly, when it is
 18 "directly related to voting, the most basic of political rights." *Rey*, 622 F.3d at 1258 (quoting
 19 *Akins*, 524 U.S. at 24-25). In contrast, in *Rey*, the Ninth Circuit rejected an alleged informational
 20 injury as a basis for standing because the purpose of the statute at issue was "not to disclose

21 ¹⁵ See, e.g., *Coal. for a Sustainable Delta v. Carlson*, No. 1:08-CV-00397, 2008 WL
 22 2899725, at *10 (E.D. Cal. July 24, 2008) ("Here, the Coalition lacks standing to sue [under the
 23 ESA] because, even if it were to prevail in this case, its injury would not necessarily be
 24 redressed. If the regulations were invalidated, even if the striped bass population were reduced
 25 to a level that measurably protected salmonid species on which they prey, there are ... other
 26 causes: operation of the Projects, toxics, in-Delta diverters, alien invasive species, all of which
 contribute to the species' jeopardy.... The extent to which all other cooperative causes will
 continue to operate is unknown. There remains total uncertainty whether reduction in the threat
 of some predators will have more than minimal effect on the protected species.").

information, but rather to allow the public opportunity to comment on the proposals.” *Id.* at 1259; *see also Baxter v. Rodale, Inc.*, 555 F. App’x 728, 730 & n.1 (9th Cir. 2014) (informational injury applies only when “primary purpose” of statute at issue is to provide information).

As applied here, CWA § 303(d) does not provide any right to information regarding impaired waters. Although CBD cites regulations requiring notice and comment, similar notice and comment requirements were insufficient to establish an informational injury in *Rey*. Also like the statute at issue in *Rey*, the § 303(d) regulations contain informational requirements that are incidental to other goals, namely, the establishment of impaired waters lists and TMDLs. *See Rey*, 622 F.3d at 1259; 40 C.F.R. § 130.7(d)(2).¹⁶ Similarly, the claimed desire of CBD’s members to participate in future proceedings does not establish injury for standing purposes, and CBD cites no legal authority for this proposition. *See* CBD Br. at 11. “Participation in agency proceedings is alone insufficient to satisfy judicial standing requirements.”¹⁷ *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27 (D.C. Cir. 2002); *see Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (filing comments was not a sufficient interest to support standing); *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 955 (7th Cir. 2005) (“A claimed participation injury cannot alone

¹⁶ The notice and comment requirements appear in the last sentence of a paragraph otherwise establishing substantive duties for the Administrator in approving impaired waters lists and TMDLs.

¹⁷ In any event, CBD and its members have already had ample opportunity to comment and participate on the issues presented in this litigation. The record contains at least 23 letters and emails from CBD to EPA and state administrators regarding the Oregon and Washington 303(d) process and responding to EPA’s national call for comments on 303(d) and ocean acidification. *See* OR1-000478; OR1-000309; OR2-000829; OR2-004495; OR2-004539; OR2-004544; OR2-004549; OR2-004555; OR2-004567; OR2-004575; OR2-004601; OR2-004622; OR2-004645; OR2-004683; WA-000916; WA-000936; WA-000956; WA-000959; WA-000969; WA-000977; WA-000980; WA-000992; WA-001005.

1 serve as proxy for the constitutionally required showing of concrete and particularized harm.”).¹⁸

2 In sum, under well-established authorities, CBD’s claimed informational injuries are not
3 sufficient to create Article III standing.

4 IV. CONCLUSION

5 CBD does not and cannot establish the Article III standing elements to create jurisdiction
6 for this Court to hear its claims. Accordingly, WSPA and API respectfully request this Court to
7 dismiss CBD’s claims for lack of jurisdiction.

8 DATED: August 29, 2014.

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19 ¹⁸ CBD also suggests in a parenthetical notation that “procedural standing may be shown
20 if plaintiff demonstrates the procedures in question are designed to protect some threatened
21 concrete interest.” CBD Br. at 11 (citing *Lujan*, 504 U.S. at 572-73). However, the mere fact
22 that CBD seeks to compel EPA, pursuant to the general judicial review provisions of the
23 Administrative Procedure Act, to disapprove the Washington and Oregon impaired waters lists
24 does not of its own establish a procedural right for standing purposes. *See Bellon*, 732 F.3d at
25 1144-45 (no procedural right for standing when plaintiffs filed citizen suit to compel agency
26 action). Moreover, as clarified by the Ninth Circuit in *Bellon*, even if a procedural right is
asserted, a causal connection is not inferred simply because a plaintiff seeks to enforce a
regulatory obligation – “the critical inquiry for standing purposes is whether the Agencies’
alleged misconduct causes injury to Plaintiffs.” *Id.* at 1144 (underlining added; italics in
original) (citing *Natural Res. Def. Council*, 542 F.3d at 1245); *see Gutierrez*, 545 F.3d at 1227
 (“[T]he redressibility requirement is not toothless in procedural injury cases.”).

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2014, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – Western District of Washington by using the CM/ECF system. Participants in this Case No. 2:13-cv-01866-JLR who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Ryan P. Steen
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